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LETTER IN LIEU OF SUPPLEMENTAL BRIEF
ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
Post Office Box 970
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Respondent) v.
Kalil Cooper (Defendant-Appellant)
New Jersey Supreme Docket No. 087742

Criminal Action: On Appeal from an Order of the
Superior Court of New Jersey, Appellate Division

Sat Below: Hon. Mary Gibbons Whipple, J.A.D.
Hon. Hany A. Mawla, J.A.D.
Hon. Morris G. Smith, J.A.D.

Honorable Judges:

Pursuant to R. 2:6-2(b), and R. 2:6-4(a), this letter in lieu of formal brief is submitted on behalf of the State.

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COUNTER-STATEMENT OF PROCEDURAL HISTORY[1]

For this supplemental brief, the State relies upon the Procedural History set forth in defendant's supplemental brief.

[1] Da refers to the appendix to defendant's Appellate Division brief.
Db refers to defendant's Appellate Division brief.
Pa refers to the appendix to defendant's Petition for Certification.
DSa refers to the appendix to defendant's supplemental brief that was filed before this Court.
DSb refers to defendant's supplemental brief that was filed before this Court.
1T refers to the motion hearing transcript dated July 17, 2018.
2T refers to the motion hearing transcript dated August 20, 2018.
3T refers to the motion hearing transcript dated January 2, 2019.
4T refers to the motion hearing transcript dated January 3, 2019.
5T refers to the motion hearing transcript dated January 7, 2019.
6T refers to the motion hearing transcript dated January 8, 2019.
7T refers to the motion hearing transcript dated January 9, 2019.
8T refers to the motion hearing transcript dated January 10, 2019.
9T refers to the motion hearing transcript dated January 11, 2019.
10T refers to the trial transcript dated January 14, 2019.
11T refers to the trial transcript dated January 16, 2019.
12T refers to the trial transcript dated January 17, 2019.
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14T refers to the trial transcript dated January 24, 2019.
15T refers to the trial transcript dated January 29 2019.

COUNTER-STATEMENT OF FACTS

For this supplemental brief, the State relies upon the Counter-Statement of Facts set forth in its Appellate Division brief.

16T refers to the trial transcript dated January 30, 2019.
17T refers to the trial transcript dated January 31, 2019.
18T refers to the trial transcript dated February 5, 2019.
19T refers to the trial transcript dated February 6, 2019.
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30T refers to the trial transcript dated March 5, 2019.
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33T refers to the trial transcript dated March 12, 2019.
34T refers to the sentencing and motion hearing transcript dated May 31, 2019.

LEGAL ARGUMENT

POINT I

THE ERROR THAT DEFENDANT CLAIMS IS IN THE TRIAL COURT'S JURY INSTRUCTION IS NOT CAPABLE OF PRODUCING AN UNJUST RESULT AND, THEREFORE, DEFENDANT'S CONVICTION SHOULD BE AFFIRMED. (NOT RAISED BELOW).[2]

Defendant claims his conviction should be reversed because the trial court's jury instruction on count four, promoting organized street crime, in violation of N.J.S.A. 2C:33-30, deprived him of his right to a fair trial. Specifically, defendant alleges the jury instruction improperly informed the jury that they could consider a crime that is not one of the predicate offenses listed under N.J.S.A. 2C:33-30, namely, conspiracy to distribute a controlled dangerous substance. Defendant asserts this error resulted in an erroneous and

[2] Defendant claims this issue was partially raised below because defense counsel's objection "was considerably broader than the one raised in Subpoint A." (DSb4 n. 3). The purpose of an objection is to alert the court to the supposed error and thus afford it an opportunity for reconsideration and, if necessary, correction of its ruling. See Di Nizio v. Burzynski, 81 N.J. Super. 267, 276 (App. Div. 1963); Gluckauf v. Pine Lake Beach Club, Inc., 78 N.J. Super. 8, 18 (App. Div. 1963). Although defendant objected to any deviation between the Indictment and the charge, counsel did not claim that conspiracy to distribute a controlled dangerous substance was not a predicate act under N.J.S.A. 2C:33-30. (26T6-19 to 7-13). Therefore, the court never was provided an opportunity to address same. As such, the State submits this issue was not raised below.

confusing instruction that was clearly capable of producing an unjust result. Defendant's claim is without merit. Although it is not disputed that distribution of a controlled dangerous substance, and not conspiracy to distribute a controlled dangerous substance, is one of the enumerated offenses set forth in N.J.S.A. 2C:33-30, the trial court's reference to conspiracy was harmless error because N.J.S.A. 2C:33-30 is a conspiratorial offense in and of itself. Indeed, the trial court's instruction on count four did not expand defendant's culpability or diminish the proofs that the State needed to present. Rather, the court's reference to the specific conspiracies being alleged, instead of only the substantive crime, had no meaningful effect. Therefore, defendant's claim of error should be rejected and his conviction should be affirmed.

Appropriate and proper jury charges are essential to a fair trial. State v. Savage, 172 N.J. 374, 387 (2002); see also State v. Gonzalez, 444 N.J. Super. 62, 70 (App. Div.) (explaining that jury instructions play a critical role in criminal prosecutions), certif. denied, 226 N.J. 209 (2016). However, where a defendant fails to request a jury charge or object to instructions that fail to include it, appellate courts review the alleged error for plain error and disregard it unless the error is of such a nature as to have been clearly capable

of producing an unjust result. State v. Funderburg, 225 N.J. 66, 79 (2016) (citing R. 2:10-2); State v. McKinney, 223 N.J. 475, 494 (2015). "The mere possibility of an unjust result is not enough." Funderburg, 225 N.J. at 79. The "error at trial must be sufficient to raise 'a reasonable doubt ... as to whether the error led the jury to a result it otherwise might not have reached.'" Ibid. (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)).

Here, the error defendant raises on appeal does not amount to plain error and, therefore, defendant's conviction should be affirmed. Defendant claims the trial court committed reversible error by instructing the jury that they could consider "conspiracy to distribute a controlled dangerous substance" as a predicate offense to N.J.S.A. 2C:33-30. Defendant's claim must be rejected by this Court. It cannot be disputed that distribution of a controlled dangerous substance is one of the predicate offenses enumerated in N.J.S.A. 2C:33-30. It likewise is not contested that N.J.S.A. 2C:33-30 is, itself, a conspiratorial offense. Indeed, as the Appellate Division aptly recognized, "N.J.S.A. 2C:33-30 specifically prohibits conspiracy to commit a wide range of chapters and a wide range of offenses, including conspiracy to distribute CDS." (Pa19). Therefore, the trial court's instruction, which informed the jurors they could find defendant guilty of violating N.J.S.A. 2C:33-30 if they

found the purpose of the conspiracy was to commit the crime of "conspiracy to distribute a controlled dangerous substance" was not plain error.

The trial court provided the following jury instruction:

> Count 4 of the indictment charges the defendant with the crime of promoting organized street crime. The indictment reads in pertinent part:
>
> The grand jurors present that Kalil Cooper between October 23, 2015, and November 25, 2015, in the City of Elizabeth and/or the City of Linden and/or the City of Newark, and/or the Borough of Clementon, did purposefully conspire with others as an organizer, supervisor, manager or financier to commit a crime enumerated in the statute.
>
> The relevant section of our statute provides in pertinent part of that: A person promotes organized street crime if he conspires with others as an organizer, supervisor or manager or financier to commit the certain crimes including conspiracy to commit murder, aggravated assault and conspiracy to distribute a controlled dangerous substance.
>
> In order to convict the defendant of this charge, the State must prove each of the following elements beyond a reasonable doubt:
>
> 1. That defendant purposely conspired with two or more persons.
>
> 2. That the purpose of the conspiracy was to commit the crime of conspiracy to commit murder and/or aggravated assault and/or conspiracy to distribute a controlled dangerous substance.
>
> 3. That within that conspiracy, defendant was financier, organizer, supervisor or manager.
>
> The first element that the State must prove beyond a reasonable doubt is that the defendant purposely conspired with two or more persons.
>
> I previously charged on you conspiracy.

The second element the State must prove beyond a reasonable doubt is that the purpose of the conspiracy was to commit the crime of conspiracy to commit murder and/or aggravated assault and/or conspiracy to distribute a controlled dangerous substance, which must be proven beyond a reasonable doubt.

In this case the State alleges that defendant conspired to commit the crimes of conspiracy to commit murder and/or aggravated assault and/or conspiracy to distribute a controlled dangerous substance. The State must prove beyond a reasonable doubt that defendant conspired to commit one of these crimes. You must unanimously agree about the crime or crimes defendant conspired to commit.

The third element that the State must prove beyond a reasonable doubt is that within the conspiracy defendant acted as a financier, organizer, supervisor or manager of at least one other person.

As I stated, financier means a person who provides money, credit or a thing of value with a purpose or knowledge that it would be used to finance or support the operations of a conspiracy to commit a series of crimes which constitute a pattern of racketeering activity, including but not limited to the purchase of materials to be used in the commission of crimes, buying or renting housing or vehicles, purchasing transportation for members of the conspiracy or otherwise facilitating the commission of crimes which constitute a pattern of racketeering activity.

An organizer is a person who purposely arranges, devises or plans an organized crime conspiracy.

A supervisor is one who purposely oversees the operation of an organized crime conspiracy.

A manager is one who purposely directs the operation of an organized crime conspiracy.

> I previously defined purposely and knowingly for you.
>
> Defendant, however, does not have to be the only or even the primary financier, organizer, supervisor or manager, and it is no defense that defendant was subject to the supervision or management of another, nor that another person or persons were also leaders of the organized crime conspiracy.
>
> If the State has proven each of these elements beyond a reasonable doubt, then you must find the defendant guilty. If the State has failed to prove beyond a reasonable doubt any element of this offense, then you must find the defendant not guilty.
>
> [28T197-11 to 200-17].

Defendant claims this instruction was improper for two reasons. First, defendant alleges that "when a statute enumerates predicate crimes, that list is deemed to be exclusive," and therefore, the trial court erred in using "conspiracy to distribute a controlled dangerous substance" as the predicate offense. (DSb5 to 6). Defendant also alleges it was improper because "the notion of a 'conspiracy to conspire' is nearly a nonsensical one [...] and this court should not strive to give statutes nonsensical readings or readings that expand their reach beyond the plain language." (DSb6). Contrary to defendant's claim, the trial court's instructions accurately informed the jury of how to consider the offense of promoting organized street crime and, as the

Appellate Division correctly found, any error was harmless. Therefore, defendant's conviction should be affirmed.

Pursuant to N.J.S.A. 2C:33-30,

> A person promotes organized street crime if he conspires with others as an organizer, supervisor, financier or manager to commit any crime specified in chapters 11 through 18, 20, 33, 35, or 37 of Title 2C of the New Jersey Statutes; N.J.S.2C:34-1; N.J.S.2C:39-3; N.J.S.2C:39-4; section 1 of P.L.1998, c.26 (C.2C:39-4.1); N.J.S.2C:39-5; or N.J.S.2C:39-9.
>
> [emphasis added].

As the language plainly states N.J.S.A. 2C:33-30 is a conspiratorial offense in and of itself: "A person promotes organized street crime if he conspires with others as an organizer, supervisor, financier or manager[...]." Thus, even though conspiratorial acts are not explicitly enumerated in the list set forth in N.J.S.A. 2C:33-30, they are inherently a part of the offense and, therefore, conspiracy to distribute a controlled dangerous substance is encompassed by N.J.S.A. 2C:33-30. Simply stated, a defendant who conspires with others to distribute a controlled dangerous substance and acts as an organizer, supervisor, financier, or manager of that conspiracy, is guilty of violating N.J.S.A. 2C:33-30. As such, even though "conspiracy" is not listed

in the chapters set forth in N.J.S.A. 2C:33-30, it undoubtedly is encompassed by the statute.

Defendant's second contention similarly is without merit. Although the trial court instructed the jury that the second element the State needed to prove was that the purpose of the conspiracy at issue was to commit the crime of "conspiracy to distribute a controlled dangerous substance," instead of instructing them that the purpose of the conspiracy was to commit the crime of "distributing a controlled dangerous substance," that error was harmless and not capable of producing an unjust result.

Pursuant to N.J.S.A. 2C:5-2:

> person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Thus, in order to find a defendant guilty of "conspiring to conspire" the jury would have to find defendant agreed to engage in conduct which constitutes such crime or attempt or solicitation to commit such crime, or that

defendant agreed to aid another in the planning or commission of such crime or an attempt or solicitation to commit such crime. Therefore, to find someone guilty of "conspiring to conspire," the jurors would need to find the defendant guilty of the underlying conspiracy itself. As such, any error in the court's charge was harmless.

Indeed, contrary to defendant's claim, a "conspiracy to conspire" is not an "agreement to agree" at some later theoretical time, but rather an "agreement by two or more people that they have agreed." Stated differently, once an initial agreement is made, there is now an ongoing conspiracy. Thus, despite the superfluous language, the court's instruction did not lessen the State's burden or increase defendant's culpability.

For example, if two people agree that they will discuss the finer points of committing an armed robbery next week, so they can commit a robbery in the future, perhaps one might say they are guilty of conspiring to commit the crime of conspiracy to commit robbery. However, that example truly is just a conspiracy to commit robbery because the "conspiracy to conspire" is ultimately incorporated into the overarching conspiracy to commit a robbery. Therefore, even though the trial court's instruction on promoting organized street crime may have departed from the language used in the statute, the

reference to a conspiratorial offense instead of a substantive offense was harmless. As such, defendant's conviction should be affirmed.

Defendant's references to State v. Grey, 147 N.J. 4 (1996), State v. Drury, 190 N.J. 197 (2007), State v. Smith, 279 N.J. Super. 131 (App. Div. 1995), State v. Staten, 327 N.J. Super. 349 (App. Div.), certif. den., 164 N.J. 561 (2000), are misplaced. In Grey, the Supreme Court reviewed whether a defendant may be convicted of felony murder even though he was acquitted of the underlying felony of aggravated arson. Grey, 147 N.J. at 5. Recognizing conspiracy was not a predicate offense for felony murder and finding the jury's verdict clearly indicated that the jurors used conspiracy to commit arson as the predicate offense, the Supreme Court reversed the defendant's conviction. Id. at 15. However, Grey is not analogous to the present matter because, unlike N.J.S.A. 2C:11-3, which does not reference conspiracies, N.J.S.A. 2C:33-30 is a conspiratorial act in and of itself. Thus, Grey does not establish the trial court's use of "conspiracy to distribute a controlled dangerous substance" as a predicate offense was improper.

Drury, Smith, and Staten are similarly distinguishable. In Drury, the Court considered whether carjacking could elevate a second-degree sexual assault to a first-degree aggravated sexual assault offense. Drury, 190 N.J. at

200. The Court found that carjacking could not be used in that regard because it was not one of the enumerated offenses, it is not simply a form of robbery, and because the legislative history would not support such an interpretation. Id. at 210-16. In Smith, the Appellate Division considered whether the enhanced sentencing provision of kidnapping only applied to the actual commission of the enumerated offenses or whether it applied to attempts. Smith, 279 N.J. 131,142 (App. Div. 1995). Finding the plain language of the statute did not include attempts, the Appellate Division held the enhancement only applied to completed offenses. Id. at 143-44. Likewise, in Staten, the Appellate Division found that the No Early Release Act does not apply to attempts because "the statute clearly and unambiguously applies only to violent crimes in which the actor actually causes death or serious bodily injury, or uses or threatens the immediate use of a deadly weapon." Staten, 279 N.J. at 354. Although each of these cases looked to the plain language of the statute at issue for guidance, as previously argued, the plain language of N.J.S.A. 2C:33-30 clearly establishes conspiracies were contemplated and incorporated into the statute. Indeed, as the Appellate Division noted when the court affirmed defendant's conviction, "N.J.S.A. 2C:33-30 specifically prohibits conspiracy to commit a wide range of chapters and a wide range of

offenses, including conspiracy to distribute CDS." (Pa19). Thus, Drury, Smith, and Staten do not establish the trial court's use of "conspiracy to distribute a controlled dangerous substance" as a predicate offense was improper.

Finally, for the first time, after Certification has been granted, defendant claims the remedy that should be imposed is a reversal of his conviction without retrial.[3] Defendant should not be permitted to seek additional relief now that he is on appeal and, therefore, his request should not be considered. However, if this Court nevertheless enables defendant to ask for this relief to be granted because of counsel's concession, and this Court finds that the error alleged by defendant is reversible error, this Court nevertheless should remand the matter for retrial because conspiracy to distribute a controlled dangerous substance is a predicate offense to N.J.S.A. 2C:33-30 and defendant was convicted of that offense. As such, if this Court finds the trial court's instructions were incorrect and that they necessitate a reversal of defendant's conviction, the remedy should be retrial and not merely reversal.

[3] Defense counsel admits that he asked for defendant's convictions to be reversed and remanded on appeal. However, he also states that such a request was a mistake with respect to POINT II(a) and that he should have asked for defendant's convictions to be reversed without remanding the matter for a retrial.

In sum, N.J.S.A. 2C:33-30 is a conspiratorial offense. Indeed, the plain language of the statute explicitly states that a person promotes organized street crime if he conspires with others as an organizer, supervisor, financier or manager to commit any crime specified in N.J.S.A. 2C:35-1 et al. Therefore, it is clear that conspiracy to distribute a controlled dangerous substance is encompassed by N.J.S.A. 2C:33-30. Although the trial court should not have reiterated that the jurors were considering conspiracies when explaining the second element of the offense, a "conspiracy to conspire" is merely a continuation of the underlying conspiracy and, therefore, the superfluous language was harmless. As such, the error that defendant complains of is not capable of producing an unjust result, and his conviction should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that defendant's conviction be affirmed.

Respectfully submitted,

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s/Milton S. Leibowitz

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